Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding	)	
	)	
Amendment of the Commission's	)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule	)	
	)	
Implementation of Section 3 (n) and 332	)	GN Docket No. 93-252
of the Communications Act	)	
Regulatory Treatment of Mobile Services	)	
	)	

COMMENTS OF THE OFFICE OF COMMUNICATION UNITED CHURCH OF CHRIST

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TO THE COMMISSION

I. INTRODUCTION

The Office of Communication ("OC\UCC") respectfully submits Comments in response to the Commissions Further Notice of Proposed Rulemaking, ((FCC 95-263, released June 23, 1995), ("FNPRM" or "Further Notice")) regarding measures to address legal uncertainties raised by the U.S. Supreme Court's decision in Adarand Constructors, Inc. v. Pena.[1]

The Office of Communication is an instrumentality of a mainline Protestant denomination of over 1.5 million members that for the past 25 years has maintained a ministry in communications policy. As a stalwart supporter of diversity of viewpoint, the Office of Communication has consistently advocated on behalf of those segments of society that have been traditionally excluded from the electronic media - the elderly, the disabled, the poor,

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[1]. 63 U.S.L. W. 4523 (U.S. June 12, 1995).

minorities and women. The Office of Communications previously submitted comments in PP Docket No. 93-253 in support of the use of minority and female preferences in connection with PCS auctions.[2]

In order to reduce the possibility of a legal challenge to its PCS affirmative action program, the Commission has decided to eliminate race- and gender-based preferences from the C block auction and to adopt provisions solely on economic size. FNPRM para. 9. The Commission's Further Notice requests comment on the scope of the supplemental record needed to satisfy the "strict scrutiny" standard that Adarand has imposed on federally sponsored race- and gender-based anti-discriminatory measures. id. at para. 11.

The following Comments are intended to examine areas that the Commission should include in the supplemental record in order to establish a compelling interest in utilizing race- and gender-based classifications. The Comments also address the need to avoid further delay in the use of minority and female preferences in connection with auctions other than C block. See FNPRM para. 11.

II. The Commission's Failure to Enforce EEO regulations with Respect to Common Carriers - Despite its Acknowledged Connection with Female and Minority Entrepreneurship - Constitutes a Compelling Interest in Adopting Race- and Gender-Based Remedial Measures.

According to the Supreme Court, government "passive participation" in private sector discrimination may constitute a

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[2]. Reply Comments of the Institute for Public Representation and the Office of Communication, PP Docket No. 93-253, November 24, 1993.

compelling interest in the use of racial or ethnic classifications.[3] Moreover, the remedial action can be aimed at continuing patterns of discrimination or the lingering effects of prior discrimination that has ceased.[4]

In order to justify the use of race-based preferences, the Commission should closely examine its failure to enforce its equal employment opportunity regulations governing common carriers. On more than one occasion the Commission has acknowledged that equal employment opportunities in upper management eventually opens the way for females and minorities to become entrepreneurs. As recent as 1994, the Commission noted in its EEO Report to Congress that,

> [Growth in the telecommunications sector] reinforces the need to reexamine [the Commission's] EEO polices to ensure that women and minorities are full participants in the overall telecommunications sector, ***especially in management positions, which are often stepping stones to ownership.***

In the Matter of Implementation of the Commission's Equal Employment Rules, MM Docket 94-34, October 5, 1994 (emphasis added).

The Commission's utter failure to enforce its common carrier EEO policies is evidenced in three areas. First, the Commission has not revised its common carrier EEO regulations since they were

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[3]. Opinion of Justice O'Connor in Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

[4]. Adarand, 63 U.S.L.W at 4542 (Souter, J., dissenting) Also see Memorandum to General Counsels from Walter Dellinger, U.S. Department of Justice, June 28, 1995 ("Dellinger Memo") at 10.

adopted in 1970.[5] Despite 25 years of unprecedented growth in the telecommunications sector the Commission has not assessed the effectiveness of its regulatory policy which merely mandates that each common carrier have an equal employment program. No fines or penalties are included in the 1970 regulations. Secondly, any kind of assessment that the Commission might undertake would be hindered by its failure to compile industry-wide statistical data. Employment reports filed by industry for the past 25 years have never been inspected, much less entered into a database that would facilitate an examination of employment patterns industry-wide.[6]

Finally, enforcement of the Commission's common carrier EEO regulations has been nonexistence, but for the part-time clerical responsibilities of one FCC employee. Clearly, the failure of the Commission to enforce EEO regulations with respect to common carriers is a direct contradiction of its duty to take into consideration violations of the national policy against discrimination when determining whether the public convenience and necessity is being served when granting certificates of authority.[7] These shortcomings have been brought to the Commission's attention

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[5]. In the Matter of Rule Making to Require Communications Common Carriers to Show Nondiscrimination in the Employment Practices, Docket 18742, August 11, 1970, 24 FCC 2d. 725 ("Report and Order")

[6]. It should be noted that the Commission, in 1970, claimed that it intended to computerize annual employment reports in order to "provide a variety of profile statistics regarding utilization of minority group and female employees within each company or the industry as a whole." Report and Order para. 6 (internal parenthesis omitted).

[7]. Report and Order para. 3.

on numerous formal and informal occasions. Most recently, it was brought to the attention of the Commission in comments filed by the Office of Communication and others in a 1994 proceeding designed to assess the overall effectiveness of the Commission's EEO programs.[8]

The Office of Communication encourages the Commission to carefully consider the fact that its failure to enforce EEO with respect to common carriers - despite its acknowledged connection with female and minority entrepreneurship - constitutes a compelling interest in adopting race and gender-based remedial measures. The Office of Communication has conducted a limited examination of the annual reports filed by common carriers in 1993 and would be glad to share the results of our cumulative analysis.

III. National Policy Favoring Diversity of Viewpoint, Competition, Job Creation Constitute, and Universal Service Constitute a Compelling Interest in Adopting Race- and Gender-Based Nonremedial Measures.

As noted in the Dellinger Memo, neither Adarand or Croson overruled the use of nonremedial objectives for race- and gender-based regulations. Furthermore, Metro Broadcasting was not overruled to the extent that it upheld FCC affirmative actions programs on the nonremedial grounds of serving the larger goal of creating greater diversity of viewpoint in the nations airwaves.[9]

In Bakke, the University of California, under the measure of

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[8]. Comments of the League of Latin America Citizens et. al., In the Matter of Emplementation of the Commission's Equal Employment Opportunity Rules, MM Docket No. 94-34, June 14, 1994, at 74.

[9]. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567-568 (1990)

intermediate scrutiny, was found to have a compelling interest in taking race into account in the admissions process in order to foster greater diversity in the student body.[10] This view was echoed in Metro Broadcasting[11] and was not explicitly disavowed by majority in Adarand.

To the extent that Bakke and Metro Broadcasting may be relied upon in the aftermath of Adarand, there is a clear line of legal precedent that indicates that affirmative action programs may be properly relied upon to serve some greater goal other than racial balancing itself. Such a goal would be the enrichment of education in the context of a university admissions program. In the context of communications the FCC must examine national goals with respect to the deployment of telecommunications infrastructure.

Congress and the FCC have on numerous occasions stated that increased competition, job creation, diversity of viewpoint, and universal service are the goals of the information superhighway of which PCS is a major component. The Office of Communication submits that affirmative action programs, such as the PCS preference program, designed to increase ownership by underrepresented segments of society serve to advance each of these goals.

In order to past the strict scrutiny test, the scope of the Commission's supplemental record must include evidence tending to

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[10]. Regents of the University of California v. Bakke, 438 U.S. 265, 311-314 (1978).

[11]. 497 U.S. at 567-568.

show that each of these goals are unquestionably advanced by increased ownership by women and minorities. The Office of Communication would welcome the opportunity to work with the Commission in compiling such information.

IV. The Commission Should Avoid Unnecessary Delays in Employing Preference Programs With Respect to Non-C Block Programs.

The Further Notice states that the elimination of the race and gender based preferences is limited to the C block auction. However, at footnote 33 the Commission indicates that a supplemental record might be required for other auctions. The time frame for an comprehensive analysis needed to compile a supplemental record has been estimated by some experts to be one to two years.

The ability of underrepresented minorities to be able to rely upon needed preference programs suggests that the Commission should focus upon the areas that it can quickly establish a *prima facie* case of a discrimination. An example of such areas has been noted in Section I, supra. According to the Dellinger Memo it is not necessary that the Commission seek to develop a conclusive analysis of discrimination in every facet of the telecommunications market.[12] Therefore, the Commission shoudl limit the scope of its study to developing a properly structured prima facie case that would require a legal challenger to employ equal, if not greater,

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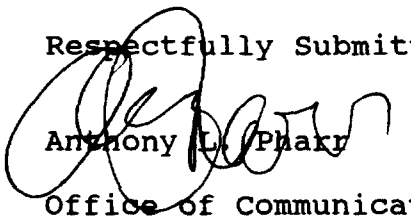
[12]. Dellinger Memo at 11.

resources to disprove.

Respectfully Submitted



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